Supreme Court, U.S.
FILED

No. 00 578

OCT 10 2000
OFFICE OF THE CLERK

In the Supreme Court of the United States

H. PRICE JESSUP, *ET AL.*,

Petitioners,

v.

THE AMERICAN KENNEL CLUB, INC., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari

Marged Harris*
Counsel of Record
George E. Marzloff
David W. Schnare
GEORGE E. MARZLOFF, P.C.
385 Garrisonville Road, Suite 110
Stafford, Virginia 22554
(540) 659-3131

Counsel for Petitioners

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

46 pp

QUESTIONS PRESENTED

Section 1 of Title 15 of the United States Code (the Sherman Act) declares illegal every contract, combination or conspiracy in restraint of trade. In *Matsushita Electric Industrial Co. v. Zenith Corp.*, 475 U.S. 574 (1986), this Court held that, at summary judgment, competitors in the marketplace are not considered conspirators under the Sherman Act if they can demonstrate that they had no rational economic motive to participate in an anti-competitive conspiracy and that their conduct at issue is consistent with permissible activity under the code, thus requiring plaintiffs to offer evidence of an agreement to cause an unreasonable restraint in trade. Two circuit courts have extended this rule to private standard setting associations engaged in writing and enforcing such standards. Four other circuits have not or would not. Instead they have relied on this Court's reasoning in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), concluding that trade associations automatically satisfy the combination requirement of the Sherman Act when they are engaged in setting or enforcing private product standards, and leaving to a rule-of-reason analysis examination of whether the standard produced an unreasonable restraint on trade. This split in circuit court decisions presents two questions:

I. **Whether the court of appeals erred in holding that the Plaintiffs failed to offer direct or circumstantial evidence of a Sherman Act combination or conspiracy, despite placing in the record a copy of the American Kennel Club's and the Labrador Retriever Club's constitutions and by-laws that authorize establishment and enforcement of a private product standard, or, alternatively, a copy of the product standard that these defendants jointly established and enforced, and which all parties agree controls access to an interstate market?**

II. **Whether the court of appeals erred in holding that a copy of the defendants' constitutions and by-laws that authorize establishment and enforcement of a private product standard, or, alternatively, a copy of the standard established and enforced by the defendants, does not constitute prima facie evidence of a Sherman Act combination or conspiracy, in the context of an anti-trust claim rising from the effect of the product standard?**

PARTIES TO THE PROCEEDING

Petitioners are H. Price Jessup, Linda Vaughn, Sally A. Kelley, Susan Owens, Annette Watkins and Nancy Hope Love. These six petitioners are the named representatives of a certified class of antitrust plaintiffs and who were appellants in the court of appeals. The respondents are the American Kennel Club, Inc. and Labrador Retriever Club, Inc., the two private standard-setting associations named as defendants in the district court and who were the appellees in the court of appeals.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION AT ISSUE
The Sherman Act 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

REQUEST FOR THE VIEWS OF
THE SOLICITOR GENERAL 17

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

PAGE(S)

Cases:

AD/SAT v. Associated Press,
191 F.3d 216 (2nd Cir. 1999) 12

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988)..... passim

Alvord-Polk v. F. Schumacher & Co.,
37 F.3d 996 (2nd Cir. 1994) 5-6, 10, 17

American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.,
456 U.S. 556 (1982)..... 6, 7, 9, 14

Capital Imagining v. Mohawk Valley Medical Assoc.,
996 F.2d 537 (2nd Cir. 1993) 15

Clamp-All Corp. v. Cast Iron Soil Pipe Institute,
851 F.2d 478 (1st Cir. 1988)..... 6

Consolidated Metals Products, Inc. v. American Petrol. Inst.,
846 F.2d 284 (5th Cir. 1988) 6, 10

Fashion Originators' Guild of America, Inc. v. FTC,
312 U.S. 457 (1941)..... 8, 9

Greater Rockford and Technology Corp. v. Shell Oil Co.,
998 F.2d 391 (7th Cir. 1993) 5

H.L. Hayden Co. v. Siemens Medical Systems,
879 F.2d 1005 (2nd Cir. 1989) 11

Industrial Assoc. of San Francisco v. United States,
268 U.S. 64 (1925) 6, 7

Jessup v. American Kennel Club,
211 F.3d 111 (2nd Cir. 2000) 1

Jessup v. American Kennel Club,
61 F. Supp.2d 5 (S.D.N.Y 1999) 11

Matsushita Electric Industrial Co. v. Zenith Corp.,
45 U.S. 574 (1986) ..... passim

Monsanto Co. v. Spray-Rite Service Co.,
465 U.S. 752 (1984) 16

National Association of Review Appraisers and Mortgage Underwriters v. The Appraisal Foundation,
64 F.3d 1130 (8th Cir. 1995) 6

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.,
472 U.S. 284 (1985) 10, 14, 17

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,
364 U.S. 656 (1961) 8, 9

Silver v. New York Stock Exchange,
373 U.S. 341 (1963) 9-10

Statutes:

15 U.S.C. § 1 ..... passim

28 U.S.C. § 1254(1) 1

Miscellaneous:

Areeda, Philip,
7 Antitrust Law 347 10

The named class representatives, on behalf of the plaintiff class, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1, *infra*) is reported at 211 F.3d 111. The August 20, 1999, opinion of the district court granting respondent summary judgment (App. 4-19, *infra*) is reported at 61 F. Supp.2d 5.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2000. A petition for rehearing was denied on July 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AT ISSUE

The Sherman Act

Section 1 of Title 15 of the United States Code provides:

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished

by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. 1 (1997).

STATEMENT OF THE CASE

1.a. Respondents are two private associations incorporated in the State of New Yor and whose constitutions and by-laws authorize "regulating the breeding of thoroughbred dogs" through private product standards. UA at A67.[1] The Labrador Retriever Club, Inc. ("LRC") prepares a description of the pure-bred Labrador retriever for approval by the American Kennel Club, Inc. ("AKC"). UA at A69. The AKC enforces their private standards, by authorizing exhibitions, licensing product judges and certifying qualifying products. UA at A69 & A400.

b. The purpose of the LRC is to encourage and promote quality in breeding of the purebred Labrador. UA at A68. LRC Membership consists predominately of economic competitors of the plaintiff class, although the approximately 750 members constitute only a small minority of the 4,000 business owners in the subject market. UA at A392. The chairman and most members of the LRC committee who prepared the standard were economic competitors of the plaintiff class, active in the subject market. UA at A414-15. So too was the LRC President who also served as the LRC's delegate to the AKC. UA at A421.

[1] UA refers to the unified appendix prepared under Fed. Rule App. Proc. 30, and submitted with Petitioner's Appellant Brief to the Court of Appeals for the Second Circuit.

c. The AKC is a "club of clubs" and does its business through its Board of Directors, a group elected by the delegate body. UA at A67, A87-89. In 1994, when the Labrador product standard came before the AKC Board of Directors, the LRC delegate also sat as an AKC Director. UA at 421. This direct economic competitor of the plaintiff class cast the deciding vote to approve the Labrador product standard. UA at A422. Several other members of the LRC who are direct competitors of the plaintiff class also serve as delegates to AKC and thus hold positions of potential influence over decisions of the Board.

2. The relevant market in this case is the interstate market for AKC Championship Breeding Stock Labrador Retrievers. UA at A555. Certification under the AKC standard controls entry to this market. It is one of seven distinct markets for Labrador dogs and the only one controlled by the AKC product standard. UA at 388. The market was formed in 1931, upon implementation and enforcement of the first AKC Labrador product standard.

3.a. The AKC Labrador product standard was revised by the LRC and AKC in 1945, 1957 and 1994. UA at A374.

b. In 1945, the LRC and AKC incorporated an incorrect description of the height of the breed. Scientific data indicates there is less than one chance in 10,000 that the height description in the 1945 standard actually represents the breed and it is not genetically possible to produce a majority of male and female offspring that will grow to within the height description. UA at A376 & A352. Approximately 77 percent of adult females and 51 percent of adult males measure outside the height description of the 1945 standard. UA at 352. The 1945 standard did not, however, disqualify products for failing to achieve what they could not achieve. Because AKC licensed judges recognized the product standard was inaccurate and because the standard did not require penalizing certification of the quality of the dog on the basis of height, these agents of the AKC ignored

the height descriptions from 1945 until 1994. UA at A363-64

c. In 1957, the LRC and AKC revised the Labrador product standard, changing fewer than ten words. The 1957 standard contained 131 descriptive phrases. UA at A400. It also contained no disqualifications.

d. In 1994, the LRC and AKC again revised the Labrador product standard, imposing the anti-competitive product standard at issue in this case. The AKC directed the LRC to revise the standard. In so doing, the LRC instituted four product disqualifications. In contrast to the 1957 standard it replaced, the 1994 standard contained 341 descriptive phrases, 95 of which appear in the 1957 standard. It added 246 new descriptive statements and eliminated 36 statements previously found in the 1957 standard. In particular, the 1994 standard required AKC dog judges to penalize or disqualify any dog not within the scientifically inaccurate height description established in 1945. UA at 400-01.

4. Implementation of the massively altered 1994 product standard caused eight forms of anti-competitive effect and no pro-competitive effect. Specifically, enforcement of the new standard produced monopoly prices for Labrador breeding stock guaranteed to produce animals capable of qualifying under the standard; it deprived customers of breeding stock; it eliminated quality competition; it excluded from the market economic rivals of the LRC standard committee chairman and the AKC director; it failed to promote uniformity and instead increased variation in breeding stock quality; it reduced customers' understandings about what is an acceptable product; it increased production costs by 194 percent; and it increased economic disproportionality among producers. UA at A405-11 & A461-67.

5.a. On May 27, 1994, Plaintiff-Petitioners filed a complaint against the AKC and LRC seeking injunctive relief in order to stop continuing anti-competitive injury to

the market. On May 7, 1998, the AKC and LRC moved for summary judgment on the sole basis that Plaintiffs could not offer sufficient evidence of a Sherman Act combination or conspiracy in restraint of trade. On June 29, 1998, plaintiff-petitioners cross-moved for summary judgment, presenting direct evidence of the combination and conspiracy in restraint of trade as well as direct evidence of an unreasonable restraint in the interstate AKC Championship Labrador Retriever Breeding Stock market and direct evidence of injury to plaintiffs resulting from implementation of the AKC product standard.

b. Neither respondents nor plaintiffs argued there was a material fact at issue on the questions of an interstate market, antitrust injury to plaintiffs or that the product standard caused more anti-competitive than pro-competitive effect on the market. The only question at issue before the court was whether plaintiffs had offered sufficient direct or circumstantial evidence that the AKC and LRC, singly or together, constituted a combination in restraint of trade or engaged in a conspiracy to restrain trade.

REASONS FOR GRANTING THE PETITION

The Second Circuit erred by requiring a plaintiff to show either or both of the standard-setting associations must have a motive or intent to unreasonably restrain trade in order to survive a summary judgment motion on whether the standard-setting associations, singly or together, acted as a combination or conspiracy in restraint of trade when engaged in setting and enforcing a product standard. The decision of the Second Circuit (App.1, *infra*), and that of the Seventh Circuit in *Greater Rockford and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 397 (7th Cir. 1993) (plaintiffs fail to show a combination or conspiracy because they have not proffered evidence of an unlawful purpose), **squarely conflict** with the opinions of the Third Circuit in *Alvord-Polk, Inc. v. F. Schumacker & Co.*, 37 F.3d 996, 1008-09

n11 (3rd Cir. 1994) (because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act when setting standards); the Eighth Circuit in *National Association of Review Appraisers and Mortgage Underwriters v. The Appraisal Foundation*, 64 F.3d 1130, 1133 (8th Cir. 1995) (an agreement regarding product standards is an implicit agreement not to deal in non-conforming products); the First Circuit in *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 487 (1st Cir. 1988) (standard-setting that serves no legitimate purpose or that is unnecessarily harmful reflects a combination or conspiracy in restraint of trade); and, the Fifth Circuit in *Consolidated Metal Products, Inc. v. API*, 846 F.2d 284, 294 (5th Cir. 1988) ("unreasonable" standards would allow for presumption of a combination in restraint of trade).

In addition, the Second and Seventh Circuits' requirement for evidence of an intent to unreasonably restrain trade cannot be reconciled with *Industrial Association of San Francisco v. United States*, 268 U.S. 64, 77 (1925) ("The statute is not aimed alone at combinations and conspiracies which contemplate a restraint of interstate commerce, but includes those which directly and unduly cause such restraint in fact.").

Neither can the result reached by the Second Circuit be reconciled with *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) ("agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products"); or *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) where the Court established a policy to impose liability on standard-setting organizations because they are best situated to prevent antitrust violations. Nor can it be reconciled with the Court's intent to place increased scrutiny on private standard-setting associations, as articulated, for example, in *Allied Tube* at 486 U.S. 501 n.6. Further, the Second Circuit

decision cannot be reconciled with the Congressional desire that the antitrust laws sweep broadly. *See Hydrolevel* 456 U.S. at 572 n.11.

1. *Industrial Association of San Francisco* holds that the Attorney General (or a private plaintiff acting in place of the attorney general) need not prove at trial that an association had an intent to cause an unreasonable restraint in trade, but merely that the association did so in fact. The Second and Seventh Circuits' opinions require plaintiffs to offer evidence of intent, and require such evidence at summary judgment in order to avoid dismissal under an extension of the rule of *Matsushita*. To require at summary judgment evidence of intent not needed at trial violates basic rules of jurisprudence, conflicts with *Industrial Association of San Francisco* and extends *Matsushita* beyond reasonable bounds. The split on this matter between the opinions of the Second and Seventh Circuits and the opinions of the Third, Eighth, Fifth and First Circuits require resolution.

2.a. Associations engaged in standard-setting are *per se* conspiracies, whether or not their standards cause unreasonable restraints in interstate trade. Though *obiter dicta*, the Supreme Court has explained why private standard-setting is routinely treated as a continuing conspiracy of the associations members. *Allied Tube & Conduit Corp. v. Indian Head, Inc*, 486 U.S. 492, 500-01 (1988). First, the Court explains, "there is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anti-competitive harm. *Id.* (citing *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). In this case, the chairman of the LRC standard revision committee admitted he was an economic competitor of the plaintiff class. UA at A326. So too was counsel for the LRC, who managed the final amendment to the standard and thus allowed his own dogs to enter the market. UA at A422. The then AKC Director and LRC

President also bred dogs that became eligible to enter the market as a result of the new standard. *Id.* Petitioners offered this information in their brief for summary judgment, showing AKC and LRC members manifest economic self-interest. Plaintiffs First Response Memorandum at 28.

Next, the *Allied Tube* opinion explains that "agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products." *Allied Tube*, 486 U.S. at 500. In this case, the defendants themselves admit the LRC and AKC specifically added the height disqualifications to the new standard to remove products from the market – specifically to remove the most successful products then in competition with some of the LRC members' products. UA at A70.

Allied Tube then opines that some private standards can have significant pro-competitive advantages, but that this merely leads courts to apply a rule-of-reason analysis of the market and alleged anti-competitive effects. *Allied Tube* 486 U.S. at 501. In this section of its opinion, the Court does not view the potential for pro-competitive effects as a means to increase plaintiffs burden of proving a conspiracy. Rather, the Court states that "concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny." *Id.* at n.6, citing *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (per curiam); and, *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941). The record before the Second Circuit in this case included the LRC and AKC constitutions that require enforcement of the standard and its disqualifications (*see* UA at A67 & A97); and admit that AKC-licensed judges have disqualified some of the Breeders products by directly enforcing the new standard (UA at A77)).

The *Allied Tube* opinion then concludes with a two step analysis:

> "'We may presume, absent a showing to the contrary, that a [government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf. Hallie v. Eau Clair, 471 U.S. 34, 45 (1985). . . . where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action."

Allied Tube, 486 U.S. at 501-02. Therefore, the Court **presumes** private standard-setting associations act as self-interested combinations and establishes a *per se* assumption of Sherman Act conspiracy by standard-setting associations engaged in standard-setting.

The *Allied Tube* opinion on *per se* assumption of conspiracy rises from a long line of decisions and well recognized antitrust theory. In addition to *Allied Tube* (private standard-setting associations have traditionally been objects of antitrust scrutiny" (*id.* at 500), the Petitioners point to *Hydrolevel Corp*, 456 U.S. at 570, "[the association is]'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.'" quoting *Fashion Originators' Guild of America*, 312 U.S. at 465; *Hydrolevel Corp*, 456 U.S. at 571, "a standard-setting organization like ASME can be rife with opportunities for anti-competitive activity."; *Hydrolevel Corp*, 456 U.S. at 574 n.13 & 576, (non-profit associations deserve equal antitrust scrutiny); and *Hydrolevel Corp*, 456 U.S. at 576, (private non-profit standard-setting associations are "in the best position to take precautions that will prevent future antitrust violations."). *See also*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Silver v. New York*

Stock Exchange, 373 U.S. 341 (1963), *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985), each building from a premise that private standard-setting associations act as continuing conspiracies when setting or enforcing product standards or professional certifications.

b. With regard to legal-economic antitrust theory, the Supreme Court looked to Professor Areeda for the theoretical grounding that "trade and standard-setting associations [are] routinely treated as continuing conspiracies of their members." *Allied Tube*, 486 U.S. at 500. Areeda also states:

> [t]here seems no conceptual difficulty in treating organizations created to serve their member-competitors or to regulate their market as continuing conspiracies of the members. Nor is there any practical problem when we focus on those improprieties reducing competition among the members or with their competitors.

7 Areeda ¶ 1477, at 347.

The Third Circuit embraced the *per se* conspiracy in *Alvord-Polk*, 37 F.3d at 1008-09 n11 ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act."). So too did the Fifth Circuit. *Consolidated Metal Products, Inc. v. API*, 846 F.2d 284, 294 (5th Cir. 1988) ("unreasonable" standards would allow for presumption of a combination in restraint of trade).

3. Those associations whose members, directors or delegates are in the regulated market are conspiracies when setting or enforcing standards. Petitioners believe the argument offered in *Allied Tube* ultimately controls a decision on the standard of proof plaintiffs must meet to

prove a conspiracy by a private standard-setting association engaged in setting and enforcing product standards, rather than a contorted application of *Matsushita Electric Industrial Co. v. Zenith Corp.*, 475 U.S. 574 (1986).

The Second Circuit adopted the district court decision that improperly extended *Matsushita*:

> When plaintiffs' proof of a conspiracy relies on circumstantial evidence of defendants' conduct, in the summary judgment context, the Supreme Court has instructed that if defendants can demonstrate that they had no rational economic motive to participate in an anti-competitive conspiracy, and that the conduct at issue is consistent with permissible activity under the antitrust laws, such conduct does not give rise to an inference of conspiracy unless plaintiffs come forward with evidence that tends to exclude permissible explanations for the conduct.

Jessup v. American Kennel Club Inc,, 61 F. Supp.2d 5, 11 (citing to *Matsushita*, 475 U.S. at 596-97 and to *H.L. Hayden Co. v. Siemens Medical Systems*, 879 F.2d 1005, 1014 (2nd Cir. 1989)). Disregarding, for the moment, that this holding is in the context of summary judgment, *Matsushita* offers a standard of proof different from that contemplated in *Allied Tube*, specifically, that, in the absence of overt evidence of an agreement to unreasonably restrict trade, a plaintiff must show (1) the defendants themselves (not their members) had a rational economic motive to participate in an anti-competitive conspiracy and (2) that the conduct at issue is not consistent with permissible activity. Application of this test to a standard-setting association, in this case and in general, is in error for several reasons.

a. First, precedent to application of the *Matsushita* rule, the court would have to conclude the plaintiffs offer no overt evidence of an agreement to restrain trade. As discussed *supra*, "agreement on a product standard is, after all, implicitly an agreement [to restrain trade]." *Allied Tube*, 486 U.S. at 500. Petitioner's evidence of private standard-setting conducted and enforced by the AKC and LRC would constitute direct evidence of the required agreement. The Constitutions of both associations serve as the overt evidence, thus mooting the need for circumstantial evidence.

b. Second, *Matsushita* requires a court to consider allegedly anti-competitive conduct . . . in its factual context. *Matsushita*, 475 U.S. at 587. *Matsushita* involved electronics businesses in direct competition within the marketplace. When establishing or enforcing standards, associations are operating on the marketplace, not in it, and are not of the same antitrust context as the electronics firms in *Matsushita*, thus dissolving the need for the associations themselves to have an economic motive in standard setting. Citing to Professor Areeda, the Second Circuit recognized the differing context of association behavior in the case when they "are buying and selling [products or services] in their own right" as opposed to setting or enforcing private standards. *AD/SAT v. Associated Press* 181 F.3d 216, 234 (2nd Cir. 1999). The Second Circuit abandoned this distinction in the instant case, thus breaking with the other Circuits with which it is now in conflict and placing the Second Circuit decision in a position that cannot be reconciled with this Court.

Thus, when examining cases within the private standard-setting context, the court should not seek an economic motive of an association, but look further to the potential motives of the associations' members. As discussed above, officers and members of the LRC and the AKC Board of Directors had an economic motive to

eliminate their potential and actual competitors. That should be enough to prove a conspiracy.

c. Third, a *Matushita*-like test would also require plaintiffs to demonstrate that the conduct at issue is not consistent with permissible activity. As applied to private standard-setting, however, this test would stand the line of cases producing the *dicta* in *Allied Tube* on its head. Specifically, the AKC and LRC argue that private associations routinely set standards and that this is a permissible activity, so the Petitioners "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *See Matsushita*, 475 U.S. at 587. Yet two years after *Matsushita*, this Court placed scrutiny on the standard-setting and enforcing association, not those harmed by the standard. "[P]rivate standard-setting by associations . . . is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits." *Allied Tube* 486 U.S. at 506-07. And recall *Allied Tube* 486 U.S. at 501 n.6 ("Concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny."

A test requiring plaintiffs to show an economic benefit to an association (rather than its members) and that the association conducted itself outside the scope of allowable standard setting activities not only fails to reflect the antitrust context but, as the Court has noted, would also result in pervasive antitrust behavior by such associations.

4. The Court has recognized that failure to establish a *per se* conspiracy test will promote anti-competitive behavior. Only *per se* antitrust liability for anti-competitive standard-setting can promote standard-setting done in "a nonpartisan manner offering procompetitive benefits," as promoted by *Allied Tube* 486 U.S. at 506-07. The Court has repeatedly made this point:

> "[associations are] in the best position to take precautions that will prevent future antitrust violations [and] the fact that [an association] is a nonprofit organization does not weaken the force of antitrust and agency principles that indicate that [an association] should be liable for [plaintiffs'] antitrust injuries."

Hydrolevel, 456 U.S. at 576.

In the absence of a *per* se approach, a plaintiff must provide evidence that an association itself has an intent to cause an unreasonable restraint in trade, but the Court will not allow consideration of procedural evidence, regardless of how obviously they point to an agreement to violate the law. "In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. . . . [T]he antitrust laws do not themselves impose on joint ventures a requirement of process." *Northwest Wholesale Stationers*, 472 U.S. at 293.

Since the plaintiffs cannot rely on circumstantial evidence of a flawed regulatory process to prove a conspiracy, lack of a *per se* assumption of conspiracy will require them to document the words or actions of a conspiracy among the members. Such a rule would encourage potential conspirators to ignore procedural safeguards and relieve associations of the need to police their members and committees. The result will be secret and unrecorded actions, lack of helpful standard-setting process, greater exclusion of competitors in the standard-setting process and expanded anti-competitive activities free of antitrust liability all for lack of overt proof.

Nothing more than a motion for summary judgment, as used here by the LRC and AKC, would deprive a plaintiff of a forum in which to demonstrate anti-competitive conduct. Congress intended the opposite result. *See Hydrolevel* 456 U.S. at 572-73 ("Thus a rule that imposes liability on the standard-setting organization – which is best situated to

prevent violations through the abuse of its reputation – is most faithful to the congressional intent that the private right of action deter antitrust violations;" and at n.11 "The apparent authority rule is also consistent with the congressional desire that the antitrust laws sweep broadly.")

5. At summary judgment, to prove a conspiracy, Petitioners should need only to show the AKC and LRC acted to regulate the market through standard setting. Because the respondents admitted to joint action and to private standard setting (*see* UA at A67 & A97), the Petitioners should be entitled to summary judgment on the existence of a Sherman Act "combination or conspiracy" as a matter of law.

a. The LRC, its members, the AKC and its directors acted in combination, not independently. The AKC and LRC have argued that the Petitioner must do more than document private standard setting, that they must bring forward evidence of a conspiracy – "facts that tend to preclude an inference of permissible conduct," citing to *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 542 (2d Cir. 1993). The specific rule in *Capital Imaging* is: "a plaintiff – to withstand defendants' summary judgment motion – must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants." *Capital Imaging*, 996 F.2d at 545 (citing *Matsushita* 475 U.S. at 588). Petitioners easily meet that requirement.

The LRC admitted that its members had to combine to agree on the new standard through committee activities and a vote. UA at A323 ("the standard revision committee would deal openly with themselves on this controversial issue and would not seek to hold the opinions of any one member up to comment or public disclosure"); and, *id.* at A324 ("Q. [prior to the vote] did you send any other communication to the membership of the L.R.C. that would invite comment or input on what you ultimately were going to ask them to vote on? A. No."). The LRC deposition thus

shows their committee chose not to act as independent parties and instead agreed to combined action. Further, the fact that the members of the LRC had no opportunity to participate in the standard setting process also shows the LRC process reflected "combined action".

The Court can also find a lack of independent action by the fact that the AKC would not approve and enforce a product standard unless it was offered by the LRC and approved by the AKC. UA at A67 & A162. Neither the AKC nor the LRC can act independently under their respective constitutions and thus show themselves to be acting in combination.

By their own words, the LRC and AKC present evidence that casts doubt on inferences of independent (not combined) action, as is true in every case involving a standard-setting association engaged in setting and enforcing product standards.

b. "Proper conduct" when establishing and enforcing product standards cannot immunize the LRC and AKC from being found to have acted in combination. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) creates the "normal course of business" test, as later applied in *Matsushita* at summary judgment. Among competitors, this would mean price cutting by a competitor, a normal business practice, would not be sufficient evidence of a conspiracy as among competitors. To prove a conspiracy, the *Monsanto* test would require evidence that defendants agreed to cut prices, to the eventual detriment of the plaintiff.

As standard-setting associations are not direct competitors, and standard-setting is not price-cutting, a court applying the *Monsanto* test would need to define the "normal course of business" of standard setting. That court, however, would be traveling a dead end road. Although *Allied Tube* desires standard-setting be "conducted in a nonpartisan manner offering procompetitive benefits" (*Allied Tube*, 486 U.S. at 507) that expectation only explains why the court

imposes strict liability onto the association; it does not establish a "normal course of business" test.

Assuming plaintiffs must prove the anti-competitive element independent of proving a conspiracy, as typical in antitrust litigation, then plaintiffs would have to prove a conspiracy by showing "non-normal" standard setting, as evidenced by a "partisan processes." This would require a record, yet in *Northwest Wholesale Stationers*, 472 U.S. at 293, "the absence of procedural safeguards can in no sense determine the antitrust analysis" and "antitrust laws do not themselves impose on joint ventures a requirement of process."

Notably, the Third Circuit recognizes the basic inapplicability of the *Monsanto–Matsushita* rule in certain cases, of which the Petitioners recognize private standard-setting is one. "[T]he analyses set forth in Monsanto and Matsushita do not apply when a plaintiff has offered direct evidence of concerted action." *Alvord-Polk*, 37 F.3d at 1001 n.2. As standard-setting and enforcement are direct evidence of concerted action, the court need not make any inference from "ambiguous evidence" and need not apply *Monsanto* or *Matsushita*.

REQUEST FOR THE VIEWS OF THE SOLICITOR GENERAL

The Second Circuit's decision does more than eliminate Sherman Act remedies for private attorneys general to bring claims against private standard-setting associations. It also bars the United States itself from bringing civil and criminal cases against these associations. In the absence of an open statement by an association, or its agent, showing an intent to cause an unreasonable restraint on trade, the Attorney General will have no more success than private parties in obtaining direct or circumstantial evidence of a conspiracy or combination of the sort required

under the rules prescribed by the Second and Seventh Circuit. The Federal Trade Commission will fare no better.

Petitioners have discussed the significance of the Second Circuit's decision with officials in the appellate branch of the antitrust division of the Department of Justice and believe that the Solicitor General can bring important and informed advice to the Court. Petitioners respectfully request that the Court request the views of the Solicitor General on the need for review of this case.

CONCLUSION

Because the decision of the Second and Seventh Circuits squarely conflict with opinions rendered by the First, Third, Fifth and Eighth Circuits, and because the decisions of the Second and Seventh Circuits cannot be reconciled with the Court's long-standing antitrust jurisprudence, Petitioners believe the Court should grant a writ of certiorari.

MARGED HARRIS
Counsel of Record
GEORGE E. MARZLOFF
DAVID W. SCHNARE
Attorneys for Petitioners

George E. Marzloff, P.C.
385 Garrisonville Road
Suite 110-A
Stafford, Virginia 22554
(540) 659-3131

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Second Circuit
entered April 18, 2000 ..... App. 1

Order Denying Petition for Rehearing,
and Petition for Rehearing *En Banc*,
United States Court of Appeals
for the Second Circuit
entered July 12, 2000 ..... App. 2

Opinion of
The Honorable Griesa
United States District Court
for the Southern District of New York
entered August 20, 1999 ..... App. 4

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

No. 99-9111.

H. PRICE JESSUP, LINDA VAUGHN, SALLY A. KELLY,
SUSAN OWENS, ANNETTE WATKINS,
NANCY HOPE LOVE,
PLAINTIFFS-APPELLANTS,

v.

THE AMERICAN KENNEL CLUB, INC.,
LABRADOR RETRIEVER CLUB, INC.,
DEFENDANTS-APPELLEES.

Entered: April 18, 2000.

Before: NEWMAN, KEARSE, AND KATZMANN,
Circuit Judges.

PER CURIAM:

The judgment is affirmed on then-Chief Judge Griesa's opinion reported at 61 F.Supp.2d 5 (S.D.N.Y.1999).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

Entered: July 12, 2000

At a stated term of the Untied States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of July two thousand.

Jessup
Plaintiff – Appellant,

v. Dkt. No: 99-9111

American Kennel Club,
Defendant – Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jessup.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: \s\ Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

No. 94 Civ. 5215(TPG)

H. PRICE JESSUP, LINDA VAUGHN, SALLY A. KELLY, SUSAN OWENS, ANNETTE WATKINS, NANCY HOPE LOVE, ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF A CLASS, PLAINTIFFS,

v.

THE AMERICAN KENNEL CLUB, INC., LABRADOR RETRIEVER CLUB, INC., DEFENDANTS.

Entered: Aug. 20, 1999.

OPINION

GRIESA, District Judge.

This is a class action antitrust suit for damages and injunctive relief. Plaintiffs, owners and breeders of purebred Labrador Retriever dogs ("Labs"), claim that rival breeders and sellers of Labs conspired to cause one defendant, the Labrador Retriever Club ("LRC"), to recommend, and the other defendant, the American Kennel Club ("AKC"), to adopt, a new rule concerning breed standards for AKC-registered, purebred Championship Stock Labrador Retrievers ("Champion Labs"). The new breed standard requires Labs to be of a certain height in order to compete in AKC dog shows for the title of Champion Lab.

The attainment of that title increases the market value of a purebred Lab. Plaintiffs allege that the new rule operates to exclude from the market for Champion Labs a large number of the dogs that plaintiffs breed from English bloodlines, but includes in the market the narrower and taller Labs more recently developed in the United States that are bred and sold by plaintiffs' competitors.

Plaintiffs and defendants have filed cross-motions for summary judgment on claims 1-5 of the complaint alleging violations of the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1, 2. Claims 6 and 7 alleging state corporate law violations are not addressed by these motions.

Defendants' motion is granted and plaintiffs' cross-motion is denied. Claims 1-5 are dismissed. The court declines to retain jurisdiction over the state law claims (6 and 7). Accordingly, the entire action is dismissed without prejudice to plaintiffs to renew the state law claims in state court.

Facts

Plaintiff class representatives are six individual owners, breeders and sellers of purebred Labs. Defendant AKC is a not-for-profit corporation chartered by the New York Legislature for the protection and advancement of purebred dogs. Membership in the AKC consists of more than 500 dog clubs from across the country. The AKC's chartered purposes include advancement of the breeding, exhibition and maintenance of the purity of purebred dogs, as well as the adoption and enforcement of rules regulating and governing competitive dog shows. The bulk of the AKC's revenues are generated through registration fees and show entries at AKC dog shows and at performance events. The AKC does not compete or engage in the breeding, selling or showing of Labs.

The AKC currently registers 145 breeds of purebred dogs. The majority of these registered breeds each have parent clubs which assume primary responsibility for promoting and advancing each club's particular breed. The LRC is a not-for-profit corporation and the parent club for the Labrador Retriever breed. The LRC's membership consists of several hundred individual Lab enthusiasts from across the country. The LRC does not compete or engage in the breeding, selling or showing of Labs.

Pursuant to the AKC's constitution, each registered breed's parent club has the responsibility of defining the standard for its breed. The "standard" for a given breed of purebred dog, including that of the Labrador Retriever, refers to a detailed, written, descriptive account of the physical characteristics-- for instance, size, shape and coat--as well as movement and temperament, that are considered definitive of that breed. The breed standards are then used by judges at AKC-registered dog shows to measure and compare the quality of dogs competing in the shows. A particular physical characteristic included in the breed standard may be stated in one of two ways. It may simply be expressed as a recommendation or preference which AKC judges can then use to compare the quality of dogs competing in a show; or it may be stated as mandatory such that a dog that does not exhibit that characteristic is disqualified from competition in the show.

The AKC's constitution provides that the amendment or revision of a breed standard by the parent club for that breed does not become effective until it is approved by the AKC's board of directors. The LRC's constitution provides that amendments to the Labrador Retriever breed standard must be approved by the members of the LRC, and that such amendments only become effective after their subsequent approval by the AKC board of directors.

In practice, the LRC's recommendation, and AKC's adoption, of an amendment to the Labrador Retriever breed standard pursuant to their respective charters follows a

multi-staged process, as the facts in this case demonstrate. First, a revision committee within the LRC drafts the proposed amendment and then votes by a majority to present the amendment for a vote by the LRC membership at large. A majority vote by the members of the LRC in favor of the amendment then operates to recommend the change to the AKC board of directors which must also vote by majority to adopt the amendment before it becomes effective.

The issues in this case involve a 1994 amendment to the breed standard for Labrador Retrievers. The breed standard in effect prior to the 1994 amendment was approved by the AKC in 1957. The 1957 standard stated in pertinent part:

> Height at Shoulders--Dogs--22 1/2 inches to 24 1/2 inches; bitches--21 1/2 inches to 23 1/2 inches.

As plaintiffs observe, the text of the 1957 height specification for the Labrador Retriever breed provided no express guidance as to whether it was intended merely as a recommendation or as a mandatory requirement for the breed. Plaintiffs contend that the shorter Labs from English bloodlines, bred and owned by plaintiffs, do not generally rise to the height described in the standard, whereas the taller American Labs do. The practical result of the 1957 standard was that, prior to the 1994 amendment, the height specification for Labs was not enforced as a strict requirement for purebred Labs to enter and compete in AKC-sponsored dog shows. Because height is only one of many attributes that are judged at the shows, dogs such as those belonging to plaintiffs, that fell below the height standard, were able to place and even win in dog show competitions based on superior quality in other facets of the breed standard.

Beginning in 1987, the AKC undertook a program with the help of the various breed parent clubs to conform all

breed standards to a standardized format for order and content, using standardized terminology.

In August 1989 the LRC submitted to the AKC board of directors a proposed, revised Labrador Retriever breed standard that had been drafted and approved by the LRC Revision Committee and approved by the vote of 72% of the LRC membership that participated in the vote. The proposal incorporated various changes not challenged in the present case. It retained the same height specification from the breed standard that was passed in 1957, again with no express statement as to whether the specification was a recommendation or mandatory.

Following submission of the proposed revised standard to the AKC board, the AKC received a number of letters in opposition to the revisions. The AKC subsequently returned the proposed standard to the LRC in November 1989 for further consideration of the criticisms raised.

In January 1993 the AKC board of directors received a second proposed revised standard from the LRC which had been approved by 68% of the LRC members voting. The second proposed standard again retained the original height specification from the 1957 breed standard. However, the new proposal provided for the first time that compliance with the height specification was mandatory. Specifically, it provided that any deviation from the height specification would constitute a disqualifying fault, meaning that a judge in a dog show would disqualify a dog not conforming to the height specified in the standard. Again, the AKC received letters in opposition to the new breed standard. The submissions on the present motions do not expressly state that this opposition related to the mandatory height requirement, but the implication is that at least part of the opposition related to this subject. The LRC membership subsequently approved several amendments to the second proposed revised standard, providing with respect to the height requirement that: (1) the requirement would not apply

to dogs less than 12 months old; and (2) dogs 1/2 inch outside the height standard would not be disqualified on the basis of height.

The amended second proposed revised standard was submitted to the AKC board of directors in November 1993. The AKC again received letters in opposition to the proposal--presumably objecting to the height requirement. The AKC then published the proposal in its own publication and solicited comment on the proposed standard.

On February 2, 1994, before the AKC voted on the proposed standard, the members of its board of directors received a letter from Richard Gross, prospective counsel for the dissenting members of the LRC and certain other Lab breeders and owners who opposed the proposed height requirement. The letter advised the board that these individuals were considering bringing a lawsuit alleging antitrust violations if the height requirement were adopted. The letter went on to itemize several ways in which the LRC had failed to comply with established procedures for adopting a new breed standard, and insisted that the proposal then before the AKC did not reflect the majority position of the LRC membership. Specifically, the letter complained to the AKC--as plaintiffs now argue to the court on the present motion--that the inclusion of a height requirement within the breed standard was not subject to an open notice and comment procedure among Lab breeders.

In February 1994, the AKC board of directors approved the amended, second revised standard by a vote of 10 to 1. The new standard became effective on March 31, 1994, thenceforth requiring dogs to be between 22 1/2 inches and 24 1/2 inches tall and bitches between 21 1/2 inches and 23 1/2 inches tall in order to be entered in competition at AKC-registered dog shows, except that dogs less than 12 months old, and dogs 1/2 inch outside the height standard, would not be disqualified on the basis of height.

Plaintiffs contend that the new height requirement does not properly establish the height standard of the

Labrador Retriever breed, precisely because the shorter Labs bred and owned by plaintiffs from English bloodlines do not grow to that size. As noted above, though the height dimensions under the 1994 amendment are the same as they have been since 1957, because the new standard makes the height specification mandatory, the dimensions included within the standard themselves have become critical for plaintiffs in a way that was not previously the case when plaintiffs' dogs were free to enter competition despite being below the height specified by the breed standard. Plaintiffs assert that certain irregularities in the process through which the LRC recommended the new breed standard to the AKC explain why a rule that is not properly representative of the breed nevertheless became a part of the breed standard.

The evidence plaintiffs present to the court of alleged irregularities in the LRC standard-setting process consists of an affidavit from David Schnare, a director, life member and former president of the LRC and owner and judge of AKC-registered Champion Labs, and a portion of the deposition testimony from Bernard Ziessow, chairman of the LRC standard revision committee which drafted the proposed standard.

Schnare states that he conducted an investigation into the procedural history of the LRC breed standard recommendation, through which he discovered not only that there was no opportunity for public comment on the new height requirement, but that the requirement was adopted into the proposed standard by only a slim margin in a committee meeting regarding which certain committee members who opposed the height requirement were not given sufficient notice to attend. According to Schnare, normally the committee's activities were carried out through the mail rather than in a meeting, thus allowing broader participation.

Ziessow testified at deposition that he did not seek input concerning the proposed revised standard from anyone outside the revision committee. Plaintiffs contend that

Ziessow is their competitor in the breeding and selling of purebred Labs and that the committee proceedings were kept from the public in order to prevent plaintiffs from having a say in the process, thus advancing the anti-competitive purpose of their competitors. There is no indication on the record, however, that closing the committee's work to the public was contrary to established committee practice or a violation of the LRC's by-laws.

With respect to the AKC's decision to adopt the second, revised standard containing the new height requirement, Schnare states in his affidavit that the official vote of 10 to 1 by the board followed a "straw vote." According to Schnare, during the straw vote, the second, revised standard passed by only a single vote that was cast by AKC director and LRC president, Nelson Sills, who plaintiffs claim is also their competitor in the market for purebred Labs.

Schnare further states in his affidavit that the directors of the AKC did not give careful consideration to all the views and objections to the standards that the AKC received, and did not adequately account for the comments received during the AKC's own comment period. He concludes that the AKC board's decision to adopt the standard may have been flawed by political vote trading, and in any event that the AKC failed to create an adequate record of its deliberations to assess what considerations went into the vote.

Both parties have submitted voluminous other materials addressing the issue of market definition for purposes of applying the antitrust laws, and what, if any, adverse effect the new height requirement has had on the relevant market. It is not necessary, however, for purposes of the motions to set forth these materials.

Discussion

Plaintiffs allege five theories of antitrust liability. Claims 1 and 5 fall under § 1 of the Sherman Act, which forbids unreasonable contracts, combinations or conspiracies in restraint of interstate trade or commerce. 15 U.S.C. § 1. Plaintiffs allege that the AKC and LRC conspired or combined with dog owners and breeders who are plaintiffs' competitors to adopt a height requirement that would effectively exclude plaintiffs from the market for Champion Labs. Plaintiffs claim that the new height requirement constitutes an unreasonable restraint of trade and is a concerted refusal by the AKC and LRC to deal with plaintiffs.

Claims 3 and 4 fall under § 2 of the Sherman Act which forbids actions by a single party, as well as conspiracies and combinations, that monopolize or attempt to monopolize a part of interstate trade or commerce. 15 U.S.C. § 2. Claim 3 alleges that defendants' adoption of the new height requirement constitutes exclusionary conduct designed to prevent plaintiffs' dogs from competing for Champion Lab status, with the intent to enable plaintiffs' competitors to monopolize the market for Champion Labs. Claim 4 alleges that defendants conspired with plaintiffs' competitors to utilize the AKC's monopoly power over the certification of Champion Labs to enhance the market position of plaintiffs' competitors.

Claim 5 is alleged under both § 1 and § 2 of the Sherman Act. The claim is that defendants conspired with plaintiffs' competitors to deprive plaintiffs of a facility essential to plaintiffs' ability to compete in the market for Champion Labs.

With the exception of the third claim concerning exclusionary conduct with the intent to monopolize, all of plaintiffs' claims share a common element of conspiracy. Specifically, the conspiracy alleged in the complaint is that plaintiffs' competitors in the market for Champion Labs

conspired with the LRC and the AKC to have the LRC recommend, and the AKC adopt, the new height requirement for the Labrador Retriever breed. The anti-competitive objective of the conspiracy, plaintiffs allege, was to preclude the shorter, English version of Labs bred by plaintiffs from competing for the title of AKC Champion Labs at AKC dog shows, thus enabling plaintiffs' competitors to charge a higher price for their taller American version of Labs which remain eligible to compete for that title.

Defendants argue that they are entitled to summary judgment because there is no evidence to support plaintiffs' allegation of a conspiracy by the LRC and AKC with plaintiffs' competitors. Plaintiffs respond that they are entitled to summary judgment on this issue because the evidence regarding the standard-setting process undertaken by the LRC and AKC in adopting the challenged height requirement demonstrates conclusively that there was a conspiracy.

To prove a conspiracy under § 1 or § 2 of the Sherman Act, plaintiffs must establish that there was an agreement by two or more parties to accomplish a specific illegal objective, be it to restrain trade under § 1, or to monopolize or attempt to monopolize trade or commerce under § 2. Evidence of a conspiracy can, of course, take the form of circumstantial evidence of defendants' conduct from which the existence of an anti-competitive agreement can be inferred. Invamed, Inc. v. Barr Laboratories, 22 F.Supp.2d 210, 221 (S.D.N.Y.1998).

Plaintiffs do not purport to have direct evidence of an express agreement to restrain or monopolize trade between the AKC and LRC and plaintiffs' competitors. Rather, they contend that an unlawful agreement can be inferred from the circumstantial evidence concerning how defendants amended the Labrador Retriever breed standard to include the challenged height requirement.

When plaintiffs' proof of a conspiracy relies on circumstantial evidence of defendants' conduct, in the

summary judgment context, the Supreme Court has instructed that if defendants can demonstrate that they had no rational economic motive to participate in an anti-competitive conspiracy, and that the conduct at issue is consistent with permissible activity under the antitrust laws, such conduct does not give rise to an inference of conspiracy unless plaintiffs come forward with evidence that tends to exclude permissible explanations for the conduct. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 596-97, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); H.L. Hayden Co. v. Siemens Medical Systems, 879 F.2d 1005, 1014 (2d Cir.1989).

The evidence before the court fails to raise an inference that the AKC and LRC, in adopting the challenged height requirement, were participants in an anti-competitive conspiracy with plaintiffs' competitors.

Defendants are not-for-profit corporations that exist for the purpose of maintaining definitive and uniform breed standards for purebred dogs. The LRC deals strictly with purebred Labs, while the AKC deals with all varieties of purebred dogs including Labs. As such, the AKC and LRC are not competitors in the alleged market for Champion Labs, and plaintiffs have expressly admitted that the LRC and AKC's economic interests, if anything, would favor more not less competition among breeders, which would lead to greater revenues from registration and entry fees at the various dog shows. Defendants therefore have no inherent economic motive to participate in an anti-competitive conspiracy with plaintiffs' competitors.

Moreover, there has never been any question in this case that the LRC and AKC's recommendation and adoption, respectively, of uniform breed standards is a legitimate, and indeed necessary, function to promote competition in the breeding and exhibition of purebred dogs. Without some definitive breed standard set by the LRC and AKC, there could not be competition among Lab owners and breeders because there would be no uniform standard against which to

measure the relative quality of Labrador Retrievers. The multi-stage process at the LRC and the AKC for amending the Labrador Retriever breed standard has been described above. Plaintiffs do not challenge the existence or purpose of the AKC and LRC, nor do they contest the legitimacy of the democratic process through which the two organizations amend the Labrador Retriever breed standard.

Plaintiffs' antitrust claims instead hinge entirely on the contention that there were certain irregularities in the amendment process adding the mandatory feature to the height standard and that these alleged irregularities raise an inference that the AKC and LRC conspired with plaintiffs' competitors in adopting the revision.

Under the standard for summary judgment set forth by the Supreme Court, however, defendants' lack of an anti-competitive motive and the legitimacy of these organizations' basic activity in setting uniform breed standards require that plaintiffs come forward with evidence tending to show that the adoption of the new height requirement in this case was not the product of a legitimate standard-setting process. This plaintiffs fail to do.

Plaintiffs rely, first, on the contention that two key figures in the adoption of the new height requirement were also competitors of plaintiffs in the market for Champion Labs. The first is Ziessow, the chairman of the LRC Standard Revision Committee which drafted the proposed standard, and the second is Nelson Sills, an AKC director and LRC president, who, plaintiffs claim, cast the decisive vote for adoption of the standard by the AKC.

It should be remembered that the height measurement specifications for Labs have been in place for many years. The only change recently made was to make the standard mandatory, with the qualifications described earlier. There is no evidence to indicate that Ziessow and Sills, and all the others who advocated and voted for the change did not have a right to do so as part of the normal process which would go into any establishment of standards. Moreover, any

standards inevitably provide competitive advantages to dogs that meet the standards and corresponding disadvantages to dogs that do not meet the standards.

In any event, viewing the actions of Ziessow and Sills, in the light most favorable to plaintiffs, as self-serving and anti-competitive, the fact remains that 68% of the LRC membership approved the new height requirement while the AKC board of directors voted to adopt the requirement by as much as 10 to 1. At the very least, the AKC adopted the height requirement by a vote of 6 to 5, assuming, as plaintiffs contend, that there was an unofficial straw vote that preceded the official vote, the latter serving simply to memorialize the board's decision. Thus, the fact that Ziessow chaired the LRC Revision Committee and that Sills may have cast the deciding vote during the AKC straw vote does not create an inference of an agreement to achieve an unlawful objective on the part of a majority of the LRC membership at large, or the other 5 AKC-board members during the straw vote, and 9 members during the final vote, all of whom voted in favor of the new requirement. There is simply nothing, apart from mere speculation, to suggest that the votes of the LRC membership and the AKC board of directors in favor of the height requirement was the result of an anti-competitive agreement rather than a legitimate exercise of the permissible function that defendants are authorized to perform in setting uniform breed standards.

Plaintiffs contend, however, that there were several irregularities in how the LRC came to include the height requirement in the proposed, revised breed standard. Specifically, plaintiffs provide the affidavit of David Schnare who states that the LRC did not provide public notice and opportunity for comment on the new height requirement, that the requirement was adopted by the LRC by only a slim margin in a committee meeting of which certain committee members who opposed the requirement were not given sufficient notice to attend, and that usually such committee activities were carried out by mail rather than in person. In

addition, plaintiffs point to the deposition testimony of Ziessow who admitted that he did not seek input concerning the proposed height requirement from anyone outside the LRC revision committee.

Assuming in favor of plaintiffs that all of this occurred and was contrary to the articles or by-laws or established practices governing past LRC Revision Committee activities, a conclusion that is not apparent from plaintiffs' submissions, the fact remains that the majority of the LRC membership voted to recommend the proposed revised breed standard to the AKC. Moreover, the antitrust laws are not intended as a device to review the details of parliamentary procedure. In any event, the majority vote of the LRC membership provided a safeguard against plaintiffs' contention that Ziessow may have manipulated the Revision Committee into serving his own anticompetitive objectives.

With respect to the AKC vote in favor of the height requirement, apart from the fact of Sills participation discussed above, plaintiffs' simply speculate in their statement of uncontested fact that:

The AKC Directors decision process was open to mischief and may have been flawed by political vote trading, thus considering issues not properly related to the decisions before it, when considering the standard.

Plaintiffs offer nothing further to impeach the AKC vote. Such speculation cannot substitute for plaintiffs' burden to present evidence tending to exclude the possibility that the new height requirement was adopted by the AKC pursuant to its legitimate, standard-setting function.

The proposed revisions in the Labrador Retriever breed standard were returned several times by the AKC to the LRC for review in light of the criticisms raised by its opponents. After a majority of the LRC membership voted in favor of the new mandatory height standard, the AKC solicited still further comment on the new requirement through its own publication. Only then was the requirement adopted by majority vote of the AKC board of directors.

Thus, both the proponents and opponents of the new requirement had significant opportunity to advocate and oppose it, and ultimately, for those among them who were members of the LRC or AKC board, to vote for or against it.

The court finds that there is no triable issue of fact as to whether the LRC and AKC engaged in a conspiracy with plaintiffs' competitors in the recommendation and adoption of the new height requirement. Summary judgment is therefore granted to defendants on claims 1, 2, 4 and 5.

Summary judgment is also granted to defendants on claim 3. Although this claim does not allege a conspiracy between defendants and plaintiffs' competitors, it rests on the allegation that defendants sought to exclude plaintiffs from the market for Champion Labs with the intent to enable plaintiffs' competitors to monopolize that market. For the same reasons that the record is devoid of evidence of an anti-competitive conspiracy, it is also devoid of evidence of any specific intent on the part of defendants in passing the new breed standard to provide plaintiffs' competitors with a monopoly in the market for Champion Labs. Claim 3 is therefore dismissed.

State Corporate Law Claims

Claims 6 and 7 are only asserted against the LRC and allege violations of New York Not-For Profit Corporation Law, the LRC's by-laws and breach of fiduciary duty. Neither party has made a motion with respect to these claims. Because there are no federal claims remaining in the action, however, the court declines to maintain jurisdiction over these claims. Claims 6 and 7 are therefore dismissed without prejudice to re-assert them in state court.

Conclusion

For the above reasons, defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied. The remaining state law claims are dismissed without prejudice.

SO ORDERED.